

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

KATHRYN L. TRUITT,  
Appellant,

v.

DEPARTMENT OF THE NAVY,  
Agency.

DOCKET NUMBER  
PH07529010062

DATE: JUN 5 1990

David B. Schultz, Esquire, Virginia Beach, Virginia, for  
the appellant.

Donald J. Musacchio, Norfolk, Virginia, for the agency.

BEFORE

Daniel R. Levinson, Chairman  
Maria L. Johnson, Vice Chairman  
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has filed a petition for review of an initial decision that dismissed her petition for appeal as untimely filed. For the reasons discussed below, we GRANT the petition for review under 5 C.F.R. § 1201.115, REVERSE the initial decision, and REMAND the appeal to the regional office for further adjudication consistent with this Opinion and Order.

### BACKGROUND

The appellant filed a petition for appeal with the Board's Philadelphia Regional Office from her June 11, 1984, removal from her Clerk-Typist position. See Initial Appeal File (IAF), Tab 1. The administrative judge issued an acknowledgment order advising the appellant that her appeal appeared to be untimely filed and providing her with an opportunity to file evidence and argument showing that her appeal was timely filed or that good cause existed for the delay. See *id.*, Tab 2.

The agency responded, alleging that the appeal was untimely filed and moving that it be dismissed. See IAF, Tab 3. No response, however, was received from the appellant.

The administrative judge dismissed the appeal as untimely filed, finding that: (1) The appeal was not filed within 20 days after the effective date of the removal action; (2) the agency had informed the appellant, in its decision to remove her, of her right of appeal to the Board and of the time limit for doing so; (3) the appeal was 5 years and 3 months late; and (4) the appellant did not respond to the acknowledgment order directing her to file evidence and argument showing good cause for her untimeliness.

The appellant has timely filed a petition for review alleging that she filed a timely response to the administrative judge's acknowledgment order and therefore that the administrative judge erred in dismissing the appeal. See

Petition for Review (PFR) File, Tab 1. The agency has filed a response to the petition for review. See *id.*, Tab 3.

#### ANALYSIS

##### Timeliness of the appellant's response to the acknowledgment order

The Board may determine that a waiver of a time limit is appropriate where a party shows good cause for the untimely filing. *Kunz v. Office of Personnel Management*, 39 M.S.P.R. 356, 357 (1988); *Alonzo*, 4 M.S.P.R. at 184.

In support of her petition, the appellant has submitted an affidavit in which her designated representative stated that: (1) Upon receipt of the acknowledgment order, he prepared a brief on the timeliness issue and an affidavit for the appellant's signature; (2) on November 14, 1989, he obtained the appellant's signature on the affidavit; (3) on November 15, 1989, he mailed the brief and affidavit, along with a cover letter, to the administrative judge; and (4) after receiving the initial decision, he contacted the agency representative, who stated that he did receive a copy of the cover letter, brief, and affidavit, and that he maintained those documents in his case. See PFR File, Tab 1.

It is well settled that sworn statements that are not rebutted are competent evidence of the matters asserted therein, including the timely filing of pleadings. See *Kcwalczyk v. Department of the Army*, 40 M.S.P.R. 396, 399 (1989). Although the agency contends that the appellant has not established that the response was mailed to the Board, it

has failed to present any evidence that contradicts or rebuts the sworn statement of the appellant's representative that the response was mailed to the Board. See PFR File, Tab 3. The appellant's representative's affidavit therefore is competent evidence of those assertions. See *Ceja v. United States*, 710 F.2d 812, 813 (Fed. Cir. 1983); *Kowalczyk*, 40 M.S.P.R. at 399. Moreover, the agency has not contradicted the statement, in the appellant's representative's affidavit, that it received the response to the acknowledgment order and that it maintains a copy in its file. See PFR File, Tabs 1 and 3.

We find, therefore, that the appellant has shown that she responded to the acknowledgment order. Furthermore, her representative's affidavit indicates that the response was filed one day before the November 16, 1989, deadline stated in the administrative judge's acknowledgment order. Accordingly, we find that the response was timely filed, and that consideration of it is appropriate.

#### Timeliness of the petition for appeal

We note that both parties have submitted evidence and argument in support of their positions regarding the timeliness of the petition for appeal. We shall, therefore, address that issue.

The time limit for filing a petition for appeal may be waived for good cause shown under 5 C.F.R. § 1201.12. See *Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980). In order to establish good cause for the untimely filing of a petition, the party must show that he exercised

due diligence and ordinary prudence under the particular circumstances of the case. *Id.* Factors that the Board considers in determining whether good cause has been shown include whether the appellant was notified of the time limit for filing an appeal or was otherwise aware of it, the length of the delay, and circumstances beyond his control that affected his ability to file a timely appeal. *Kirsch v. Department of the Navy*, 30 M.S.P.R. 573, 574 (1986); *Alonzo*, 4 M.S.P.R. at 184.

Pursuant to 5 C.F.R. § 1201.21, when issuing a decision to an employee on a matter appealable to the Board, an agency is required to provide the employee with, among other things, a notice of the Board's timeliness requirements, the address of the appropriate Board office for filing an appeal, and a copy or access to a copy of the Board's regulations. Indeed, in *Shiflett v. United States Postal Service*, 839 F.2d 669, 673 (Fed. Cir. 1988), the court found that an agency's failure to provide an employee with a required notice of appeal rights "effectively contributed to [the employee's] failure to file a timely appeal, or, perhaps, even caused such untimely filing altogether." The court found further that this failure constituted good cause for the late filing of the appeal. *Id.* at 674.

The record here shows that the agency's decision letter contained the required appeal rights information. See IAF, Tab 3, Subtab 4a. There is no indication in the record, however, that the appellant was notified of or received the

decision letter. On the contrary, the appellant has filed an affidavit stating that she was never notified by the agency of any appeal rights before the Board or of any time limitations for filing an appeal. She further avers in that affidavit that she was unaware of the existence of the Board until her initial meeting with her current representative on October 19, 1989. See PFR File, Tab 1. The agency has failed to present any evidence that contradicts or rebuts these statements. The appellant's affidavit therefore is competent evidence of those assertions. See *Ceja*, 710 F.2d at 813; *Kowalczyk*, 40 M.S.P.R. at 399; *Nash v. United States Postal Service*, 40 M.S.P.R. 271 (1989) (employee showed good cause for his four-year delay in filing an appeal from the agency's removal decision by submitting an affidavit stating that he did not receive the agency's decision letter and that he first learned of his right to file an appeal with the Board while reviewing his official personnel file).

Moreover, the record shows that the appellant acted with due diligence in appealing the removal action once she became aware of her right to appeal to the Board. As we noted above, the appellant states in her affidavit that she did not become aware of her appeal rights until October 19, 1989, only seven days before the petition for appeal was filed with the regional office. See PFR File, Tab 1; IAF File, Tab 1.

In its opposition to the appellant's petition for appeal, the agency contends that it would be prejudiced by waiver of the time limit. See IAF, Tab 3. A showing that the agency

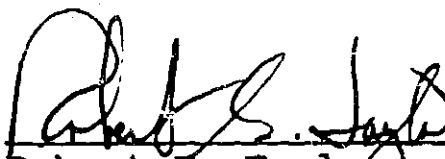
would be prejudiced by this action is relevant to a decision on whether a time limit should be waived. *Alonzo*, 4 M.S.P.R. at 184. The agency, however, supports its allegation regarding prejudice only by stating that it "feels that its ability to defend the case has been impaired considering document disposal and the availability of employees with knowledge of the action ... ." IAF, Tab 3 at 5. We find that these broad allegations constitute an insufficient basis for finding that waiver would prejudice the agency unduly. See *Walters v. Department of Transportation*, 18 M.S.P.R. 234, 237 & n.8 (1983); *Moschner v. United States Postal Service*, 7 M.S.P.R. 523, 527 (1981); *Alonzo*, 4 M.S.P.R. at 184 & n.3.

Finally, in reaching our decision, we note that there are strong policy considerations that favor giving an employee a hearing on the merits of his or her case. See *Cresson v. Department of Air Force*, 27 M.S.P.R. 665, 667 (1985); *Walters*, 18 M.S.P.R. at 237; *Alonzo*, 4 M.S.P.R. at 183.

#### ORDER

Accordingly, we REMAND this appeal to the regional office for a hearing\* and adjudication on the merits of the appellant's petition for appeal.

FOR THE BOARD:

  
Robert E. Taylor  
Clerk of the Board

Washington, D.C.

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\* The appellant requested a hearing in her petition for appeal. See IAF, Tab 1.